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Supreme Court, U.S.
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No. 00-1292

In The
Supreme Court of the United States

ROBERT H. BARRETT,
Petitioner,

v.

BOROUGH OF CARLISLE,
Respondent.

On Petition For Writ Of Certiorari
To The Commonwealth Court Of Pennsylvania

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO BRIEF OF BOROUGH OF CARLISLE

For more than fifteen (15) years, the Borough of Carlisle (herein, "the Borough") has unlawfully regulated the simple appearance of properties owned by Petitioner, Robert H. Barrett (herein, "Barrett") under false claims of public safety hazards and historic importance. The Borough has repeatedly (1) cited Barrett for alleged violations of the local property maintenance code and (2) denied Barrett building and demolition permits based on historic district regulations.

The Borough's claims against Barrett's properties are unsupported by factual evidence. Barrett has owned property in the Borough for over thirty (30) years. Under Barrett's ownership, no one has ever been harmed by Barrett's properties, and no tenant has ever filed a complaint with the Borough over a condition of Barrett's properties.

In its Response Brief, the Borough claimed that, "commencing in 1992, the Borough cited Barrett on a continuous basis for well over one hundred and seventy (170) Code violations." In fact, on appeal Barrett was found **NOT GUILTY** on nearly every citation. The few citations on which he was found guilty were against buildings for which Barrett had been denied building or demolition permits by the Borough based on historic district regulations. While refusing to issue building and demolition permits, the Borough continued to cite Barrett for the same buildings for which they denied him permits.

The Borough adopted the Building Officials and Code Administrators (BOCA) Code as its local property maintenance code. The BOCA Code is a set of "model building regulations for the protection of public health, safety

and welfare," and cannot lawfully be used to regulate the simple appearance of property. The Borough repeatedly uses the BOCA Code to regulate the simple appearance of property by falsely claiming public safety hazards and by condemning buildings without cause. A typical example is a large, brick garage owned by Barrett. For over six (6) years, the Borough has condemned the garage based on the false claim that it is "likely to collapse." The building was never "likely to collapse" and will continue to stand indefinitely.

Where it has been unable to regulate the simple appearance of property based on false public safety claims, the Borough regulates the simple appearance of property based on false claims of historic importance.

Under the provisions of Pennsylvania Act 167 of June 13, 1961, historic districts may be established within the Commonwealth of Pennsylvania and regulated by local government or other authority. However, before a local historic district can be regulated, it must first be certified as historically important by the Pennsylvania Historical and Museum Commission (herein, "the State Commission"). The Borough alleges that a thirteen (13) block area designated as the Carlisle Historic Preservation District (herein, "the Historic District") was certified by the State Commission in 1975. Neither the Borough nor the State Commission has produced an official document or other factual evidence of the alleged certification. Further, neither the Borough nor the State Commission has ever produced any evidence of a certification procedure, including certification criteria, notification of property owners, supporting evidence, analyses of specific properties, reasons for district boundaries, or anything else. When Barrett attempted to subpoena State Commission records of the alleged certification of the Historic District, the Court of Common

Pleas of Cumberland County, Bayley, J. (herein, "the Trial Court") denied the subpoena.

The Borough has repeatedly claimed that the issue of the validity of the Historic District is barred by the principle of *res judicata*. In State Courts, Barrett sought a single demolition permit for a building situate at 134-136-138 East High Street, Carlisle, but did not seek to overturn the Historic District.

In Federal Court, however, the primary relief requested by Barrett was to vacate the alleged certification of the Historic District. Issuance of a demolition permit was a secondary issue included to demonstrate to the Court the actual harm caused by regulation of the Historic District.

In the immediate case, Barrett has asked the Court to vacate a default judgment against him by the Trial Court, which appointed an agent to physically take possession of and to sell eight (8) improved properties owned by Barrett for refusing to comply with Historic District regulations and for refusing to allow warrantless searches of his papers under discovery proceedings in violation of the Fourth Amendment.

On February 05, 2001, after the Trial Court denied a stay of its Decree, the Borough and the Redevelopment Authority of Cumberland County (herein, "the Redevelopment Authority") took possession of Barrett's eight (8) improved properties by forced entry and physically locked Barrett out of his properties, including his personal residence. Tenants were directed to pay all rents to the Redevelopment Authority, and Barrett was ordered not to perform work on any of his properties. The Trial Court has deemed this action "joint possession," and will sell each of Barrett's properties unless its Decree is vacated.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. **Pennsylvania State Courts improperly applied the decision of the United States Supreme Court in *Penn Central* by failing to recognize historic certification validity as a threshold condition for application.**

The Borough claimed in its Response Brief that "... the Supreme Court of Pennsylvania has consistently and repeatedly recognized this Court's decision in *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 57 L. Ed.2d 631 (1978)." In fact, the Supreme Court of Pennsylvania has improperly applied *Penn Central* by failing to recognize historic certification validity as a threshold or prerequisite condition for application.

The decision in *Penn Central* begins with the words **"On this record, ..."** These words establish that the decision in *Penn Central* is dependent on specific conditions of the case which are an inherent part of the final decision.

On the record of *Penn Central*, the New York City Landmarks Preservation Commission notified the owners of Grand Central Terminal of the proposed landmark designation (historic certification), and afforded the owners an opportunity to appear before the Commission at a public hearing to challenge the criteria and supporting evidence for the proposed certification. Following the public hearing, the Commission certified Grand Central Terminal. Although the owners challenged the historic certification before the Commission, they did not challenge the certification before the Court, as specifically noted by the Supreme Court of the United States in *Penn Central*. Because the owners did not challenge the historic certification before the Court, the

validity of the historic certification was assumed to be true and became a threshold or prerequisite condition for the Court's final decision in *Penn Central*.

Although the Court did not directly identify historic certification validity as a threshold condition in its decision, the condition is inherent in the Court's words "On this record." **In fact, establishment of historic certification validity constitutes a threshold condition for application of *Penn Central*.**

In the immediate case and in the preceding case docketed at No. 00-977, Barrett specifically challenged the validity of the alleged historic certification of the Historic District. **Thus, in the immediate case before the Court, the threshold condition for application of *Penn Central* has not been met.**

In its Response Brief, the Borough further stated that the Supreme Court of Pennsylvania has consistently applied the decision of *Penn Central* in *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 635 A.2d 612 (1993); *Pittsburgh v. Weinberg*, 544 Pa. 286, 676 A.2d 207 (1996); and *Park Home v. City of Williamsport*, 545 Pa. 94, 680 A.2d 835 (1996). In fact, the Supreme Court of Pennsylvania has misapplied *Penn Central* to these cases and to the immediate case.

In *United Artists*, the Pennsylvania Supreme Court vacated the historic certification of the Boyd Theater on grounds that the theater could not be certified as historic based on the Art Deco interior of the building. The Court, however, ignored the threshold condition of *Penn Central* and improperly denied that a Fifth Amendment "taking" had occurred during the temporary period of the theater's improper historic certification.

In both *Weinberg* and *Park Home*, the property owners failed to challenge the historic certification of their properties, thereby assuming its validity. Because the threshold condition of *Penn Central* was not challenged, the Pennsylvania Supreme Court's decisions in those cases were correct, albeit by chance. The Court failed, however, to properly apply *Penn Central* because it failed to recognize the threshold condition of historic certification validity in each case.

In the Borough's Response Brief, they further stated:

> "It is well-settled in Pennsylvania that the historic designation of property without the owner's consent does not amount to a taking under the Fifth and Fourteenth Amendments to the United States Constitution, but is rather a restriction on the owner's use of that property."

This generalized statement does not accurately reflect the decision of the Supreme Court of the United States in *Penn Central*. Specifically, the Borough's statement fails to recognize the threshold condition (e.g., historic certification validity) which must first be established before *Penn Central* can be applied. Pennsylvania State Courts have repeatedly failed to recognize the threshold condition and thereby have erred in application of *Penn Central* to both *United Artists* and to the immediate case. Before *Penn Central* can be applied, the validity of the historic certification must be clearly established.

II. The Borough misrepresented to the Court the significant differences in issues presented and relief requested between Barrett's State and Federal Complaints.

In its Response Brief, the Borough argues that Barrett is

attempting to relitigate issues previously decided in State Courts. In May 1996, Barrett filed an appeal in State Court of the simple denial of a single demolition permit by the Borough. In the State case, the relief requested was limited to obtaining a demolition permit. Barrett did not attempt to overturn the Historic District.

In July 1998, Barrett filed a Complaint in the United States District Court to **vacate the alleged certification of the Historic District** which was constitutionally flawed. The significant difference between the State and Federal actions was the nature of the relief requested and the scope of the properties affected. In the Federal case the primary relief requested was to vacate the alleged certification of the entire Historic District, which included eleven (11) properties owned by Barrett and approximately 1,000 other properties. In order for Barrett's claim to be considered ripe in Federal Court, Barrett included the denial of the demolition permit for the purpose of demonstrating specific harm.

III. The Borough falsely claimed violations of the property maintenance code and historic district regulations in order to regulate the simple appearance of Barrett's properties.

Regulation of the simple appearance of property is not a legitimate state function, with the limited exception of historically important property. Only where the conditions of property constitute an actual public fire, safety or health hazard can those conditions be regulated.

Because it could not lawfully regulate the simple appearance of property, the Borough attempted to circumvent this prohibition by falsely claiming that Barrett's properties were public safety hazards. While claiming that Barrett's

properties were public safety hazards, the Borough never produced any evidence of harm to the public, to other property owners, or to Barrett's tenants. In fact, no one was ever harmed by Barrett's properties during his thirty (30) year ownership. In fact, the Borough's claims of public safety hazards are perjured statements made for the purpose of regulating the simple appearance of Barrett's properties.

In the Borough's Response Brief, the Borough has again attempted to misrepresent facts to the Court by stating that it cited Barrett for well over one hundred and seventy (170) Code violations since 1992. In fact, on appeal, Barrett was found **NOT GUILTY** on nearly every citation. Of the <u>few</u> citations on which he was found guilty, all were against buildings for which the Borough had denied Barrett building or demolition permits based on Historic District regulations. While refusing to issue building and demolition permits, the Borough continued to cite Barrett for the same buildings for which they had denied him permits.

Barrett's garage is another example of perjured statements made by the Borough to the Court. For more than six (6) years the Borough has condemned a garage owned by Barrett as "likely to collapse" because of a wall damaged by a car accident. On appeal, a mason in the capacity of an expert witness testified that he had examined the building and that it was not going to collapse. Six (6) years later, the garage has not collapsed, will continue to stand indefinitely, but remains condemned by the Borough. In addition, the Borough has repeatedly denied Barrett permits to perform work on the garage, including repairs to the damaged wall, based solely on Historic District regulations.

The Borough's claims that Barrett's properties constitute public safety hazards are perjured statements made in an attempt to unlawfully regulate the simple appearance of

Barrett's properties and to prejudice the Court against Barrett.

Because the Borough cannot lawfully regulate the simple appearance of property under the BOCA Code, the Borough devised a scheme to establish the Historic District. Under Historic District regulations, the Borough is able to completely regulate the simple appearance of property, including paint colors, building materials, structural designs, and most importantly the demolition of buildings.

The Borough and the State Commission, however, failed to establish a Constitutionally valid historic district. **There is no factual evidence to support the alleged certification of the Historic District.** In fact, the Historic District is a district in name, only. In the absence of valid historic certification, the Borough has simply alleged that its Historic District was certified, and proceeded to regulate the District.

Absent valid historic certification, there is no lawful basis for the regulation of the simple appearance of property within the Historic District.

IV. The conditions of "joint possession" imposed by the Trial Court constitute a "taking" under the Fifth Amendment.

Under the conditions of the Trial Court's Amended Final Decree, Barrett is to retain "joint possession" of his properties along with the joint receivership headed by Judge Edgar B. Bayley of the Trial Court, the Borough of Carlisle, and the Redevelopment Authority. The Trial Court's assignment of "joint possession" is, in fact, a Fifth Amendment "taking" with a new name. In reality, Barrett will be locked out of his properties, including his personal residence and will effectively lose all rights of ownership.

The Trial Court will sell Barrett's properties following a decision in the immediate case.

On February 05, 2001, after the Trial Court denied a stay of its Decree pending appeal to the Supreme Court of the United States, the Borough and the Redevelopment Authority forced entry of each of Barrett's eight (8) improved properties, including his personal residence, physically entered each property and changed the locks, thereby locking Barrett out of his properties. Tenants were ordered to pay all rents to the agent, to contact the Redevelopment Authority if they had any problems, and Barrett was ordered to perform no further work on his properties. These actions are to be followed by the actual sale of the properties and clearly constitute a physical "taking" of property under the Fifth Amendment.

CONCLUSION

For the reasons set forth, Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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